No. 89-890

(2)

In The

Supreme Court of the United States

October Term, 1989

HOOPA VALLEY TRIBE AND
HOOPA TIMBER CORPORATION,

Petitioners,

vs.

RICHARD NEVINS, CONWAY COLLIS,
ERNEST DRONENBURG, WILLIAM BENNETT,
CALIFORNIA STATE BOARD OF EQUALIZATION
AND STATE OF CALIFORNIA,

Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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As requested by the Clerk's letter of January 31, 1990 respondents Richard Nevins, et al ("The State") respond to the cross-petition of the Hoopa Valley Tribe, et al. ("The Tribe") for certiorari.

The cross-petition arises out of the same judgment as the State's petition for certiorari in No. 89-686, in which all briefs have been filed.

STATEMENT OF THE CASE

The Tribe filed its first motion for summary judgment on February 1, 1984. The Tribe placed its principal reliance on the Supremacy Clause preemption claim, although it did discuss the tribal sovereignty claim briefly at the tail end of its brief. On July 6, 1984 the District Court issued a decision granting the motion on the preemption claim but leaving the tribal sovereignty claim undecided.

On February 7, 1984 the Ninth Circuit issued its decision in *White Mountain Apache Tribe v. Williams*, 798 F.2d 1205 (9th Cir. 1984). *White Mountain* held that a Supremacy Clause violation lies outside the scope of the Civil Rights Act, 42 U.S.C. § 1983, and therefore will not support an attorney's fees award under 42 U.S.C. § 1988.

On July 22, 1987, more than three years later, the Tribe moved for summary judgment a second time on the tribal sovereignty claim. The sole purpose of the motion was to lay the basis for an attorney's fees award claim. (Cr.-Pet. App., p. A-3.)

On October 6, 1987 the District Court issued its decision declining to rule on the Tribe's second motion for summary judgment. In doing so the District Court noted:

> "Plaintiffs neglected to press further the tribal sovereignty claim [after the 1984 ruling] or bring to this court's attention the problems associated with the Ninth Circuit's holding in *Williams* until three years after judgment on the merits. Both defendants and this court understood damages to be the only remaining issue after this judgment." (Cr.-Pet. App., p. A-4.)

REASONS FOR DENYING A WRIT

I

A SUPREMACY CLAUSE VIOLATION WILL NOT SUPPORT AN ATTORNEY'S FEES AWARD UNDER 42 U.S.C. § 1988

The Tribe first argues that it is entitled to attorney's fees on the basis of its successful claim that the California timber tax is preempted by the General Forest Regulations promulgated by the Secretary of the Interior for Indian timber.[1] But in *Golden State Transit Corp. v. City of Los Angeles*, ___ U.S. ___, 110 S.Ct. 444, 448-49 (1989), decided after the cross-petition was filed, this Court held that the Supremacy Clause does not create rights enforceable under § 1983. As the Tribe admits, *Golden Transit* controls this case. (Cr.-Pet., pp. 4-5.)

It is true that *Golden Transit* recognized that a federal law which preempts state action may also create a federal right for which a § 1983 remedy is available. However, at no point in this litigation has the Tribe argued that the regulations create an independent right in Indian tribes to be free of the possible economic burden of a state tax imposed on non-Indian purchasers of Indian timber. Nor could such an argument be made inasmuch as the regulations merely deal with such matters as fire prevention and bidding procedures and do not even mention, let alone specifically prohibit, state taxation.

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[1] These regulations are reproduced in the appendix to the State's petition in No. 89-686 commencing at page A-27.

II

THE TRIBE'S RIGHT TO SELF-GOVERNMENT IS NOT SECURED "BY THE CONSTITUTION AND LAWS" WITHIN THE MEANING OF § 1983

The tribal sovereignty claim cannot support a § 1988 fee award because, as this Court recognized in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172-73 (1973), the Tribe's right to self-government predates the formation of our federal government and therefore is not "secured by the Constitution and laws" within the meaning of § 1983. There is no reason to review the Ninth Circuit's thoughtful analysis on this issue. *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989).[2]

None of the seven decisions which the Tribe cites at footnote 5 of its cross-petition support the proposition that the right of tribal self-government "derives its force" from federal legislation. For example, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), the first decision listed in the footnote, merely holds that the federal government is "firmly committed" to the right of self-government. A statute expressing a commitment to a right is not the same thing as a statute creating a right. The other six decisions are similarly distinguishable.

The only statute the Tribe cites as supporting its argument is 25 U.S.C. § 1300i-7, in which Congress "ratified and confirmed" the Tribe's governing documents. But by its own terms § 1300i-7 does not create a right of

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[2] The Ninth Circuit's decision is reproduced in the appendix to the State's Petition in No. 89-686 commencing at page A-1.

self-government; it instead acknowledges that the Tribe has exercised the right in a proper manner. Furthermore, to view § 1300i-7 as the source of the Tribe's governmental powers leads to the conclusion, surely unintended by the Tribe, that the Tribe did not have a right to govern itself prior to 1989, when § 1300i-7 was enacted.

The Tribe also argues that, if the right to tribal sovereignty is not considered to be a right established by federal law, then Indian litigants will be deprived the remedy "that Congress intended to provide in 42 U.S.C. § 1983." (Cr.-Pet., p. 8.) This argument fails because there is no indication that Congress had such an intent.

Lastly, the Tribe complains that the courts below disregarded their duty to make a "specific inquiry . . . into the precise text of treaties and statutes, construed in the appropriate manner." (Cr.-Pet., p. 10.) But in the very next paragraph the Tribe admits that "no treaty is applicable in this case", and noted above the only statute cited by the Tribe, 25 U.S.C. § 1300i-7, is likewise inapplicable.

III

THE TRIBAL SOVEREIGNTY CLAIM CANNOT SUPPORT A FEE AWARD BECAUSE IT IS NOT A SUBSTANTIAL UNADJUDICATED CLAIM WITHIN THE MEANING OF *MAHER V. GAGNE*, 448 U.S. 122 (1980)

Below the State argued that the Tribe was not entitled to a § 1988 fee award on the basis of its tribal sovereignty claim because the claim was not a basis of the judgment in the Tribe's favor. The Ninth Circuit rejected this argument, instead ruling without discussion that the claim

was a substantial unadjudicated claim within the doctrine of *Maher v. Gagne*, 448 U.S. 122 (1980). *Hoopa Valley Tribe v. Nevins, supra*, 881 F.2d 657, 661-62. The State nevertheless contends that the absence of any significant relationship between the claim and the judgment provides an alternative ground for denying the writ.

Although *Maher* holds that § 1988 fees may be awarded to a prevailing party on the basis of a substantial unadjudicated claim, it has never been understood as allowing fees for a claim which played no role at all in the outcome of the case. See *Smith v. Robinson*, 468 U.S. 992, 1006 (1984), holding that in determining whether to award § 1988 fees, "[d]ue regard must be made, . . . to the relationship between the claims on which effort was expended and the ultimate relief obtained."

In this case there is no relationship between the tribal sovereignty claim and the judgment in the Tribe's favor. The claim was only briefly mentioned in the Tribe's first motion for summary judgment, was not ruled on, and was dusted off more than three years later, long after the merits of the case had been decided. The Tribe's tactical maneuver in reviving the claim therefore brings to mind Justice Powell's warning about claims asserted "solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought." *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980), dissenting.

CONCLUSION

For the reasons forth above it is respectfully submitted that the cross-petition for a writ of certiorari should be denied.

DATED: March 1, 1990

Respectfully submitted,

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